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<b>D.L., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 13-887</b>
	)	<b>Issued: July 18, 2013</b>
<b>DEPARTMENT OF DEFENSE, DEFENSE</b>	)	
<b>COMMISSARY AGENCY, Camp Pendleton, CA,</b>	)	
<b>Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

On March 5, 2013 appellant timely appealed the January 29, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) which terminated benefits. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective January 29, 2013.

Appellant, a 54-year-old former commissary/store worker, has an accepted claim for lumbar contusion, cervical strain and temporary aggravation of cervical degenerative disc disease

<sup>1</sup> 5 U.S.C. §§ 8101-8193.

which arose on October 16, 1997.<sup>2</sup> For reasons unrelated to her injury, the employing establishment terminated appellant's services effective January 31, 1998.<sup>3</sup> Beginning February 1, 1998, OWCP paid her wage-loss compensation for temporary total disability. Appellant has not worked since the October 16, 1997 employment injury.

In a report dated August 12, 2011, appellant's treating physician, Dr. Adekola A. Ashaye, a Board-certified internist, stated that her neck sprain/strain and back contusion had long since resolved, but appellant's cervical degenerative disease and manifestations remained. The latter condition caused pain and loss of range of motion in the neck. Dr. Ashaye also reported radicular symptoms in appellant's neck and shoulders and spasms in her trapezius muscles. He noted numbness, tingling and weakness in her arms. Given that 14 years had passed since appellant's employment injury, Dr. Ashaye considered the reported findings and deficits as permanent. He explained that the condition had not resolved due to some underlying pathology in appellant's neck. Dr. Ashaye noted that a recent cervical magnetic resonance imaging scan revealed diffuse idiopathic skeletal hyperostosis which created large osteophyte complexes. The combination of appellant's cervical degenerative disease and skeletal hyperostosis and a thickening posterior longitudinal ligament caused central canal spinal stenosis with resulting radicular symptoms. Dr. Ashaye stated that it appeared appellant's injury both aggravated an existing condition and contributed to the dysfunction. Over the past few years appellant also developed lumbar degenerative disease with bilateral lower extremity radicular symptoms. Dr. Ashaye stated that she could not resume her former store worker duties. He provided an August 15, 2011 work capacity evaluation (OWCP-5c) with permanent restrictions of sedentary, light-duty work.

Dr. Peter A. Snitovsky, a Board-certified hand surgeon and OWCP referral physician, examined appellant on September 16, 2011. He diagnosed cervical degenerative disease with tenderness and painful decreased range of motion of the cervical spine. The October 16, 1997 employment injury temporarily aggravated appellant's preexisting cervical disc disease and the aggravation lasted approximately three to four months. Appellant's current cervical complaints were manifestations of a degenerative process that began prior to the work injury. Dr. Snitovsky found that appellant was presently unable to perform her regular work duties due to the advancement of her preexisting degenerative condition. These limitations were in all likelihood permanent, but were unrelated to her employment injury. Dr. Snitovsky advised that appellant was capable of performing part-time (four hours) light or sedentary work with a 10-pound lifting restriction. Additionally, she was limited to 1 hour standing and 30 minutes walking. Dr. Snitovsky reiterated that appellant's restrictions were not caused by any employment-related conditions.

OWCP found a conflict in medical opinion between Dr. Ashaye and Dr. Snitovsky. It referred appellant to Dr. Bradley M. Fideler, a Board-certified orthopedic surgeon, selected as the medical referee. In a report dated January 24, 2012, Dr. Fideler found that appellant had preexisting degenerative disc conditions in her neck and low back. He explained that the October 16, 1997 employment injury caused a temporary aggravation of appellant's preexisting

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<sup>2</sup> A pallet containing 2-liter Coca-Cola bottles collapsed, striking appellant on the leg and pushing her into a cardboard box baler.

<sup>3</sup> Prior to appellant's dismissal, she had been receiving continuation of pay from the employing establishment.

cervical degenerative disc condition which had resolved roughly around February 1998. Any ongoing symptoms or treatment after February 1998, was related to her underlying degenerative disc condition and unrelated to the employment injury. Appellant's current nonwork-related diagnoses included diffuse multilevel degenerative disc disease and idiopathic skeletal hyperostosis. Dr. Fideler noted that appellant had significant symptoms and limitations due to her nonwork-related conditions. Because of the progressive nature of her degenerative disc condition, as well as her significant deconditioning and disuse atrophy, she was incapable of performing her regular work duties. Dr. Fideler restricted appellant to sedentary, light work with no heavy lifting, no repetitive bending and no twisting at the waist. However, appellant currently had no work restrictions with respect to the October 16, 1997 employment incident.

In a December 8, 2012 report, Dr. Ashaye reiterated the diagnoses of cervical degenerative disease and idiopathic skeletal hyperostosis. He stated that appellant's work injury had aggravated an existing condition and caused additional injury. Appellant remained disabled from performing her former duties as a commissary/store worker, but could perform sedentary/light-duty work.

On December 20, 2012 OWCP issued a notice of proposed termination of wage-loss and medical benefits based on Dr. Fideler's January 24, 2012 report. It afforded appellant 30 days to submit additional evidence or argument in response to its December 20, 2012 notice of proposed termination of benefits.

While appellant acknowledged receipt of the notice, OWCP did not subsequently receive any additional evidence or argument in response to the proposed termination of benefits.

On January 29, 2013 OWCP issued a final decision terminating wage-loss compensation and medical benefits that day.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>4</sup> Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.<sup>6</sup> To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.<sup>7</sup>

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an

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<sup>4</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>5</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>6</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

<sup>7</sup> *Calvin S. Mays*, 39 ECAB 993 (1988).

examination.<sup>8</sup> For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.<sup>9</sup> Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.<sup>10</sup>

### ANALYSIS

Dr. Ashaye and Dr. Snitovsky offered differing opinions regarding whether appellant had continuing residuals of her October 16, 1997 employment injury. There was apparent consensus that the employment-related cervical strain and lumbar contusion had resolved; but the physicians disagreed regarding the nature of residuals due to an aggravation of appellant's preexisting cervical degenerative disc disease and subsequent development of diffuse idiopathic skeletal hyperostosis. OWCP accepted a temporary aggravation of cervical degenerative disc disease. Dr. Snitovsky believed the employment-related aggravation subsided approximately three to four months after the October 16, 1997 injury. He also found that the skeletal hyperostosis was not a work-related condition. By contrast, Dr. Ashaye was of the opinion that the employment-related aggravation of appellant's cervical degenerative disease was permanent and that the October 16, 1997 employment incident contributed to the development of her skeletal hyperostosis. Because of this conflict, OWCP properly referred appellant to Dr. Fideler as an impartial medical examiner.

Dr. Fideler found that appellant's October 16, 1997 employment injury was a temporary aggravation of her preexisting cervical degenerative disc condition which resolved around February 1998. He also found that her idiopathic scheduled hyperostosis was a nonwork-related condition. While acknowledging that appellant was presently unable to perform her date-of-injury duties, Dr. Fideler attributed her current limitations to the progressive nature of her degenerative disc disease, as well as her significant deconditioning and disuse atrophy.

When a case is referred to an impartial specialist to resolve a conflict, the resulting medical opinion, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.<sup>11</sup> The Board finds that Dr. Fideler provided a well-reasoned report based on a proper factual and medical history. He accurately summarized the relevant medical evidence, and relied on the statement of accepted facts. Dr. Fideler examined appellant and provided a thorough review of her relevant medical records. His report included detailed findings and medical rationale supporting his opinion. As the impartial referee, Dr. Fideler's January 24, 2012 opinion was entitled to special weight.<sup>12</sup>

On December 8, 2012 Dr. Ashaye reiterated his opinion on causal relation. He offered no additional support for his opinion regarding the lingering effects of the October 16, 1997

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<sup>8</sup> 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321 (2012); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

<sup>9</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>10</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

employment injury. The Board has held that subsequent reports from a physician who was on one side of a medical conflict that has since been resolved are generally insufficient to overcome the weight accorded the medical referee's report or to create a new medical conflict.<sup>13</sup> Dr. Ashaye's December 8, 2012 follow-up report is insufficient to overcome the special weight properly accorded Dr. Fideler's January 24, 2012 opinion or to create a new conflict in medical opinion. Accordingly, the Board finds that OWCP satisfied its burden to terminate appellant's wage-loss compensation and medical benefits effective January 29, 2013.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision.<sup>14</sup>

### **CONCLUSION**

OWCP properly terminated appellant's wage-loss compensation and medical benefits effective January 29, 2013.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 29, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2013  
Washington, DC

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>13</sup> *I.J.*, 59 ECAB 408, 414 (2008).

<sup>14</sup> *See* 5 U.S.C. § 8128 (a); 20 C.F.R. §§ 10.605, 10.607.